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No. 85-1407

IN THE

Supreme Court of the United States

October Term, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK STATE ELECTRIC & GAS CORPORATION, ORANGE AND ROCKLAND UTILITIES, INC., and ROCHESTER GAS AND ELECTRIC CORPORATION,

Appellants,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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Questions Presented

1. Are a utility's First Amendment rights violated by a Commission ratemaking determination which does not limit or regulate the company's speech?

2. Does a utility have a First Amendment right to have ratepayers finance speech which is unnecessary to the rendition of utility service?

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Appellants,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

Pursuant to Rule 16 of the Court's Rules, Appellee Public Service Commission of the State of New York ("Commission") hereby moves that either this appeal be dismissed on the ground it does not present a substantial federal question or that the judgment of the New York State Court of Appeals be affirmed.

Statement of the Case

A. Introduction

Under the New York Public Service Law, the Commission is charged with regulating electric, gas, telephone, and water utilities to ensure that essential public services are furnished to consumers at just and reasonable rates. In discharging its rate-setting responsibility, the Commission reviews and analyzes claimed operating expenses that utilities seek to recover in rates charged their customers. When costs are incurred for dual purposes (*e.g.*, utility and "non-utility" purposes) "a prime function of the Commission, as a regulatory body, is to separate those costs which should be borne by ratepayers from those which are properly chargeable to [the utility's] shareholders" *Rochester Gas & Elec. Corp. v. Public Service Comm. of State of N.Y.*, 51 NY2d 823 at 825 (1980), *appeal dismissed* 450 U.S. 961 (1981).

At issue in this appeal is a Commission ratemaking determination which merely "separates" the expenses of the customer bill mailing process between ratepayers and utility shareholders when such process is used jointly for "utility" purposes (*i.e.*, mailing bills to ratepayers) and "non-utility" purposes (*i.e.*, promoting the companies' political objectives through bill inserts). A description of the proceedings below follows.

B. Proceedings Before the Commission

In July of 1980, the Commission initiated a proceeding to examine the proper ratemaking treatment of costs associated with the utilities' use of inserts in the customer billing envelope. The Commission invited comments from interested parties addressing the manner

in which it could oversee the billing process "to accommodate both the bill inserts and the interests of the ratepayers who pay for the billing mechanism" (2a).[1] It sought specific comment on the question of whether "the use of the billing process by utility management for political purposes amounts to a subsidy forced to be supported by the ratepayers." *Id.* It also indicated it was interested in "methods of cost allocation between shareholders and ratepayers when the billing process is used to promote the interests of utility management" (9a) and it set forth several possible methodologies for allocating costs where such process is used for the "utility purpose" of sending customers their bills as well as for the "non-utility" purpose of promoting utilities' political objectives (9a-10a). Thereafter, the Commission received numerous comments on these issues, including those submitted by three of the Appellants herein.[2]

C. Commission Decision

By order adopted at its March 23, 1983 session (JSa18-23), the Commission determined that for ratemaking purposes, an allocation of the fixed costs of the bill mailing process was appropriate where such process was used jointly for the utility purpose of sending customers their bills and also for the non-utility purpose of

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[1] References to _____a are to the appendix to this motion to dismiss. References to JSa_____ are to the appendix to the Jurisdictional Statement.

[2] The Appellants alleged that allocation of any bill mailing expenses to shareholders would violate the Court's holding in *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980).

advertising or promoting utilities' political objectives.[3] In so ruling, the Commission found that (1) utility shareholders derive "an economic benefit by using the billing process (whose costs are paid for by ratepayers) as opposed to alternative means to disseminate political messages;" (2) the use of the bill mailing process to disseminate management's political views "provides a subsidy to utility management;" and (3) "when a billing is used both for service related functions and for management purposes, it may properly be considered a joint use with costs to be shared by both parties." (JSa20-21).

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[3] As indicated in the Commission's decision, and as used throughout this brief, the term "political objectives" or "political views" refers to communication falling within the language of long-standing Account 426.4 of the Uniform System of Accounts. 16 NYCRR, ch II, subch F, Account 426.4. This account is a "below the line," nonoperating account and when expenses are booked therein, they generally are not subject to recovery in rates and thus are borne by shareholders. See *Southwestern Elec. Power Co. v. Federal Power Comm.*, 304 F.2d 29 at 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924; see also *Alabama Power Co. v. Federal Power Comm.*, 482 F.2d 1208 at 1217, footnote 21 (5th Cir., 1973). The language of this account is as follows:

4[illegible] Expenditures For Certain Civic, Political and Related [illegible]tivities

[illegible]ount shall include expenditures for the purpose of [illegible]ıg public opinion with respect to the election or [illegible]ent of public officials, referenda, legislation, or [illegible]ces (either with respect to the possible adoption of new [illegible]enda, legislation or ordinances or repeal or modification of [illegible]ing referenda, legislation or ordinances) or approval, [illegible]dification or revocation of franchises; or for the purpose of [illegible]nfluencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

Having determined that an allocation of bill mailing costs was appropriate, the Commission then analyzed the various methodologies by which such allocation could be implemented in the context of its ratemaking proceedings. Ultimately, it determined that where the bill mailing process is used for both the utility purpose of rendering customers their bills and also for the non-utility purpose of promoting the companies' political objectives, 50% of the fixed costs of such process (*i.e.*, postage, envelopes, processing and mailing list costs) should be allocated to various "utility" accounts and 50% to a "below-the-line," "non-utility" account (JSa22-23). The effect of this accounting treatment is to apportion these costs equally between ratepayers and shareholders when the bill mailing process is used for both utility and non-utility purposes.

D. Proceedings in the New York Courts

The utilities appealed the Commission's decision on various grounds and by decision issued January 26, 1984, the New York State Supreme Court, Special Term, dismissed their petition (JSa13-16). The Court found that the Commission's cost allocation decision was not a penalty or tax, that such decision did not restrict the utilities from using the bill mailing process as a means of promoting their shareholders' political objectives, and that the companies were "merely being asked to bear an equitable share of the costs of the mailing when they use bill inserts which are primarily for the benefit of stockholders." *Id.*

On appeal to the New York State Supreme Court, Appellate Division, the Court (3-2) affirmed the judgment below (JSa5-12). The Court held that the Commission "is empowered to consider the 'nonutility' use of assets . . . or the nonutility nature of company

expenditures" and that it can "take appropriate rate-making action to ensure that ratepayers are not compelled to pay for the cost of such activities or expenditures." *Id.* The Court also found that the Commission had rationally resolved "a complex cost allocation issue" and that its decision "merely holds that when a utility bootstraps its message onto a vehicle fully paid for by the recipient customers, it should then share equally in the cost of that mailing."[4] *Id.*

The New York State Court of Appeals unanimously affirmed the judgment (JSa1-4). Recognizing that a prime function of the Commission "is to separate those costs which should be borne by ratepayers from those which are properly chargeable to shareholders," the Court found that in allocating bill mailing costs, the Commission was "only implementing its statutory and regulatory mandate" (JSa3-4). It also held that the Commission's decision was "a proper attempt to balance competing First Amendment interests of the shareholders and the ratepayers" and that if the costs "were not allocated the ratepayers might have cause to complain that they were being compelled to subsidize and support the speech of the utilities in violation of the rule in *Abood v. Detroit Bd. of Education* (431 U.S. 209) and *Wooley v. Maynard* (430 U.S. 705)." *Id.*

The utilities thereafter filed the instant appeal. For the reasons set forth *infra*, the appeal should be dismissed for lack of a substantial federal question or the judgment of the New York State Court of Appeals should be affirmed.

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[4] Appellants' assertion that the Court found the Commission's cost allocation order to be a "content-neutral restriction of speech" (Juris. Statement, p. 6) is incorrect. The Court expressly recognized that the "order in no way restricts petitioners from utilizing bill packet inserts to disseminate their views on controversial subjects" (JSa9).

ARGUMENT

I. The First Amendment Does Not Entitle Utilities To Recover In Rates Communicative Expenses Which Are Unnecessary To The Rendition Of Utility Services.

The Commission determined that when the bill mailing process is used both for the service-related purpose of delivering customers their bills—and also for the nonservice-related, "nonutility" purpose of advertising or promoting utilities' political objectives—the expenses of the process should be allocated equally between ratepayers and shareholders to reflect the dual use. The rationale for this decision is straightforward.

First, it is based on the fact that when the billing process is used for both service related purposes and nonservice-related, non-utility purposes (*i.e.*, promotion of utilities' political objectives), the process is transformed for ratemaking purposes into a "joint use" with costs properly being allocated between the two uses. The Commission is clearly empowered to allocate costs based on a joint use of utility plant—and to recognize the "non-utility" nature of claimed expenses—to ensure that jurisdictional rates reflect only those costs that are necessarily related to the utility services being furnished to consumers. See, *e.g.*, *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 280 (1976); *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 586-591 (1945); *Panhandle Co. v. FPC*, 324 U.S. 635, 641-642 (1945); *Groesback v. Duluth, South Shore & Atlantic Ry.*, 250 U.S. 607, 614-615 (1919) (all four cases recognizing the propriety of allocating costs of jointly-used utility plant for jurisdictional ratemaking purposes); see also *Rochester Gas & Elec. Co. v. Public Serv. Comm. of State of N.Y.*, 51 NY2d 823, 825 (1980), *appeal dismissed* 450 U.S. 961 (1981) (upholding Commission

disallowance of communicative expenses found "unnecessary to the rendition of utility service"); *Matter of New York Tel. Co. v. Public Serv. Comm. of State of N.Y.*, 64 AD2d 232, 247-248 (App. Div., 1978), *appeal denied* 46 NY2d 710; *Matter of New York Water Serv. Corp. v. Public Serv. Comm. of State of N.Y.*, 12 AD2d 122 (App. Div., 1960), *appeal denied* 10 NY2d 705 (both cases upholding Commission disallowance of expenses found to be "non-utility" in nature).

Second, the Commission's decision is based on a long-established policy, which is followed by many other utility regulatory bodies *and which is not challenged here by the utilities*, that expenses related to a utility's efforts in advertising or promoting its political objectives are not necessary costs of service and should not, therefore, be borne by monopoly ratepayers. See, *e.g.*, New York State Public Service Commission, Uniform System of Accounts, Account 426.4, 16 NYCRR, ch II, subch F (requiring electric utilities to book political expenditures in this "below-the-line," nonoperating account, thereby assigning such costs to shareholders); N.Y. Pub. Serv. Law, §114-a (providing that in "determining rates to be charged customers, the Commission shall not include the cost of legislative lobbying on behalf of any public utility"); 16 U.S.C. §§2623(b)(5), 2625(h)(1)(b) (requiring States to consider adopting standard prohibiting utilities from recovering from ratepayers any "direct or indirect" expenditure relating to utilities' political advertising); Federal Energy Regulatory Commission, Uniform System of Accounts, Account 426.4, 18 C.F.R. Part 101 (requiring electric utilities to book political expenditures in this "below-the-line," nonoperating account, thereby assigning such costs to shareholders).

And notwithstanding the Appellants' assertions, it is obvious that without an allocation of costs here, ratepayers *would* be bearing, in a very real sense, expenses of utilities' political advertising. This is because the ratepayers finance the bill mailing process, and the shareholders' use of such process—without contributing to any of its fixed costs—would confer a substantial economic benefit on them which would effectively constitute a ratepayer subsidy.[5]

[5] Appellants argue that because enclosure of their political advertising material in the billing envelope does not normally impose any *additional costs* on ratepayers, there is no ratepayer subsidy or support of their political activities. Juris. Statement, pp. 12-16. This argument is devoid of merit because it is based on a narrow, *incrementalist* analysis which conveniently (and by definition) ignores the fixed overhead costs of the bill mailing process (*i.e.*, postage, envelopes, processing and mailing list costs). These fixed costs are just that, *fixed costs*, and they are indisputedly present during those months when shareholders make use of the billing process to promote their political objectives. The companies offer no rational explanation for their theory that the First Amendment requires the Commission to ignore the existence of these fixed costs for allocation purposes and thereby grant shareholders a "free ride" for the promotion of their political objectives. See *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. at 548-555 (BLACKMUN, REHNQUIST, J.J., dissenting); *cf.* 447 U.S. at 543 (opinion of POWELL, J.) and 447 U.S. at 544 (MARSHALL, J., concurring). In fact, as recognized by Justice Marshall (concurring) and Justice Stevens (dissenting) in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.* (_____ U.S. _____, Feb. 21, 1986), the utility in that case conceded that the state regulatory commission could legally "make reasonable allocations of cost" when there was a shareholder use of the bill mailing process. *Id.*, Brief of Appellant, p. 39.

II. The Commission's Cost Allocation Determination Does Not Restrict The Utilities' First Amendment Rights.

The Appellants' entire First Amendment argument is premised on their assertion that the Commission's cost allocation decision is a content-based *restriction or suppression of speech*. See, *e.g.*, Juris. Statement, pp. 9-12. It is apparent, however, that the Commission has not restricted, limited, or regulated the companies' speech. In fact, it is *undisputed* that the utilities may enclose their shareholders' political material in the billing envelope each and every month of the year if they so desire. Thus, the assertions that the Commission is "suppress[ing] the utilities' speech on public issues" and "choosing which issues are worth discussing or debating" are demonstrably without merit.[6] (Juris. Statement, pp. 5, 9).

That the Commission's ratemaking treatment of costs here does not constitute a cognizable restriction of the utilities' First Amendment rights is demonstrated by *Rochester Gas & Elec. Co. v. Public Serv. Comm. of State of N.Y.*, 51 NY2d 823 (1980), *appeal dismissed* 450 U.S. 961 (1981). In that case, the Commission disallowed rate recovery of certain of the utility's communicative expenses which were determined to be "unnecessary to the rendition of utility services." The

[6] Appellants' argument that by allocating costs the Commission imposes a "financial penalty" on their speech is equally meritless. Juris. Statement, p. 9. The Commission is routinely called upon to allocate costs when a joint or non-utility use of utility plant is present; indeed, such allocations are an integral part of the ratesetting process. As such, the allocation of costs for ratemaking purposes cannot accurately be characterized as a penalty. See *Southwestern Elec. Power Co. v. Federal Power Comm'n.* 304 F.2d 29, 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924 (1962).

company argued that by not allowing rate recovery of these expenses (and thereby effectively requiring shareholders to bear them), the Commission was restricting its free speech rights. The New York State Court of Appeals rejected this argument, recognizing that mere ratemaking disallowance of communicative expenses does not constitute a restriction or limitation of a utility's First Amendment rights.

> There is no doubt that petitioner's expressional activity is entitled to First Amendment protection (see, *e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557). *But the Public Service Commission in this case has imposed no restraint, direct or indirect, upon petitioner's advertising or communications.* Instead, the Commission has merely refused to include a portion of petitioner's informational advertising as an allowable expense, and determined that such costs should be paid by the utility's shareholders. . . . Petitioner claims, in essence, that it has a constitutional right to have the ratepayers defer the entire cost.
>
> It is an accepted principle that although the Constitution may provide a citizen the right to engage in a certain activity free of governmental restrictions, it places no general corresponding duty upon government to ensure the availability of all resources necessary to realize that freedom (see, *e.g., Harris v. McRae*, 448 U.S. 297; *Norwood v. Harrison*, 413 U.S. 455, 462). Thus, the Public Service is not obliged to allow the utility to charge ratepayers for all communications which the utility may choose to make. (*Id.*, 51 NY2d at 825) (emphasis added).

The company's appeal to this Court (where it made the identical argument) was dismissed for lack of a substantial federal question. *Id.*, 450 U.S. 961 (1981).

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (involving denial of certain tax exempt status to nonprofit corporations engaged in the protected First Amendment activity of political lobbying), the Court again recognized that government does not restrict First Amendment rights by declining to ensure that the exercise of such rights is subsidized:

> TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment . . . Congress has merely refused to pay for the lobbying out of public moneys. . . . In these cases, as in *Cammarano* Congress has not infringed any First Amendment rights or regulated any First Amendment activity . . . Congress has simply chosen not to pay for TWR's lobbying. We again reject 'the notion that First Amendment rights are somehow not fully realized, unless they are subsidized by the State.' (*Id.*, 461 U.S. at pp. 545-546).

One final point illustrates the flawed nature of Appellants' First Amendment argument. The companies do *not* challenge (on First Amendment grounds or otherwise) the constitutionality of Account 426.4 of the Uniform System of Accounts which, as discussed *supra*, requires shareholders to bear the costs of utilities' political activities. See *Southwestern Elec. Power Co. v. Federal Power Commn.*, 304 F.2d 29, 47 (5th Cir., 1962), *cert. denied* 371 U.S. 924 (1962). Having conceded the propriety of requiring shareholders to finance utilities' political activities, it makes no sense for Appellants to challenge the Commission's cost allocation decision; for such decision merely recognizes that mailing expenses are part of the costs involved in a shareholder use of the billing process for political purposes.

Conclusion

For the reasons stated, the appeal should be dismissed for lack of a substantial federal question or the judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 16, 1980.

COMMISSIONERS PRESENT:

Charles A. Zielinski, Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Karen S. Burstein
Richard S. Bower

CASE 27805—Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity.

ORDER INSTITUTING PROCEEDING

BY THE COMMISSION:

On June 20, 1980, the United States Supreme Court, on the basis of the record before it, invalidated orders of the Commission (1) banning the use of bill inserts as a mechanism for the dissemination of the utility's position on controversial matters of public policy and (2) banning promotion of electricity through the use of advertising. The Court, however, did not preclude further regulation of bill inserts and promotional advertising so long as the regulation does not violate the free speech guarantee of the First Amendment to the United States Constitution. Before taking any action with respect to either promotional advertising or the use of bill inserts, we are

requesting comments from the parties as to what possible directives are required to assure that the public interest sought to be advanced by our invalidated orders continues to be protected.

Bill Inserts

Our order banning bill inserts made it unnecessary for us to consider how to regulate the billing process to accommodate both the bill inserts and the interest of the ratepayers who pay for the billing mechanism. That matter is left open in the wake of the Supreme Court's decision invalidating our prohibition. We invite the parties to submit views on what regulations, if any, are necessary and permissible, with respect to controversial bill inserts.

The Commission believes that there are at least five issues requiring comment from the parties.

First, does the use of the billing process by utility-management for political purposes amount to a subsidy forced to be supported by the ratepayers? If so, what is the extent of the subsidy, should it be eliminated and how can it be eliminated?

In connection with these issues, we invite comments and information with respect to the cost and effectiveness of various forms of communication including not only bill inserts, but also alternative means of informing the public such as newspapers, radio and television.

Second, the Supreme Court noted that a customer who finds a political message offensive may simply throw it away. If all messages are lumped together, the customer will also throw away any valuable consumer information.

Should the Commission require that messages on bill inserts that relate to utility service information *e.g.*, consumer rights, conservation measures, or new rate filings be isolated from other messages the utility chooses to present? How can this be accomplished?

Third, is it practical to allow customers who do not desire to receive controversial messages to so choose and require utilities not to send such messages to them? Can this be done without depriving them of other utility service-related information also included in bill inserts?

Fourth, if a utility sends messages advocating its point of view on controversial matters should the billing packet be opened to other parties with opposing views? When we imposed our bill insert ban we rejected a request to include an anti-nuclear power bill insert along with a Consolidated Edison Company of New York, Inc. billing. Is that decision still reasonable, or required, where utilities may use the billing process to express their views? If the billing packet is to be opened to outside parties, how would competing claims for space be evaluated?

Fifth, would it be appropriate for the Commission to ban *all* bill inserts regardless of their content or does the Supreme Court's decision or the utilities' obligations to disseminate consumer-related information under the Public Service Law preclude this action?

Appendix A--Order of the Public Service Commission of the State of New York, July 16, 1980.

We invite comment on these specific issues and any other questions relevant to further Commission action that interested parties may wish to raise. Pending our resolution of this proceeding, utilities may use bill inserts to disseminate their managements' views on controversial matters. We reserve the right, however, to do whatever is required to treat political bill inserts issued during the pendency of this proceeding consistently with our final order.[1]

Promotional Advertising

The Supreme Court invalidated our ban on promotional advertising because it included promotion of usage that might result in more efficient or equally efficient use of energy resources. It also determined that we had not demonstrated that our goal of energy conservation could not be accomplished through less restrictive means than a ban on advertising *e.g.*, by requiring inclusion of information about relative costs and efficiencies of the advertised usage. The Court also suggested that the Commission "...consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy..."

Before taking any further measures to control promotional advertising, we desire the comments of the parties on the issues not resolved by the Supreme Court's decision. Comments should be submitted on whether and under what circumstances the Commission may be required to reinstitute its ban on advertising.

[1] For example, our final order may have cost allocation implications and/or impose responsibilities for accommodating responses by parties with opposing views.

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980.

Should advertising that is contrary to our goal of energy conservation; *i.e.*, advertising of usage and appliances that use more energy than alternatives be banned or can our energy conservation objectives be accomplished through less restrictive means, for example, by requiring inclusion of information about relative costs and efficiencies of the advertised usage. Also, we desire comments on whether and under what circumstances a system of previewing advertising campaigns should be instituted. If the Commission were to institute a previewing program, what measures would need to be taken to provide for objective judgments as to whether particular advertisements required alteration before their publication.

The Commission Orders:

1. A proceeding is hereby instituted:

   (a) to consider the use of bill inserts by utility managements to disseminate their positions on controversial issues of public policy. The parties are invited to include comments on the matters outlined above as well as other relevant issues;

   (b) to consider whether action is necessary to regulate the use of promotional advertising by electric utilities in order to achieve the Commission's objective of conservation of energy resources. The parties are invited to submit comments on the matters outlined above as well as any other relevant issues.

Appendix A—Order of the Public Service Commission of the State of New York, July 16, 1980.

2. Any party desiring to submit comments in accordance with the invitation in paragraph 1 is required to send twenty copies in the case of utilities and three copies in the case of other parties to the Commission's Secretary no later than September 7, 1980.

3. This proceeding is continued.

By the Commission,

(SIGNED) SAMUEL R. MADISON
Secretary

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 16, 1980.

COMMISSIONERS PRESENT:

Charles A. Zielinski, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Richard S. Bower

CASE 27805—Proceeding on Motion of the Commission as to the Use of Bill Inserts and Promotion of Electricity.

BY THE COMMISSION:

At the session of July 19, 1980, the Commission instituted this proceeding to consider further what action, if any, was required following decisions by the United States Supreme Court invalidating Commission orders (1) banning the use of bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy; and (2) banning promotion of electricity through the use of advertising. The Commission asked for comments by September 7, a deadline which was extended to October 7 at the request of several parties. A list of those submitting views is appended.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

Our review of the parties' responses and the previous Commission proceedings addressing advertising and bill inserts leads us to conclude that little purpose will be served by extensive Commission involvement in these areas. We continue to be concerned that ratepayers receive information relating to utility service and that bill inserts provide such information in a clear and readable manner. Accordingly, we will monitor utility bill inserts to see whether customer service-related information is being omitted, minimized or otherwise affected adversely in any way, including subordination of such information to messages by utility management espousing the utilities' position on controversial issues of public policy. If we find that service-related information is being affected adversely, we will not hesitate to take action to correct the problem.

Our order instituting this proceeding requested comments on whether use of the billing process by utility management for political purposes amounted to a forced subsidy from ratepayers and, if so, how to deal with the subsidy issue. We are persuaded, based on our review of the comments of the parties, that we should consider further the subsidy problem; but, since we offered no specific proposals in our order, we will offer an additional opportunity for comment on some.

We are specifically concerned about the methods of cost allocation between shareholders and ratepayers when the billing process is used to promote the interests of utility management. Several issues must be considered, including the threshold question of whether a fair and proper allocation of costs can be made at all. It would be

senseless to adopt a process that diverted substantial staff resources away from more important regulatory responsibilities to endless examinations of specific messages in order to allocate precisely the costs of using the billing process between shareholders and ratepayers.

The Commission's Uniform System of Accounts already provides that the cost of using the billing process for political purposes (*i.e.*, the printing of the specific message and associated costs) shall be allocated to the shareholders. Beyond that, however, we are considering the possibility of allocating additional costs to the shareholders. Comments are requested upon the desirability, including the difficulty of implementation, of the following approaches to cost allocation:

1. allocation of so much of the cost to shareholders as a third party would be willing to pay to distribute its material with the utilities' bills;

2. allocation of the full costs of a mailed bill and insert, according to a set formula, between shareholders and ratepayers when the bill insert contains political messages. In this case, costs to be allocated would include: stamps, envelopes, processing costs and the cost of assembling and updating ratepayer mailing lists;

3. allocation of cost to shareholders that the utility avoids by using inserts rather than another advertising medium; and

4. allocation of all the costs of a mailing to the shareholders if the mailing contains a political message.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

In addition, we invite comments on how to implement cost allocation schemes in the context of a rate proceeding. Should the past experience of a utility with respect to the use of the billing mechanism for political purposes be used to adjust rate year mailing costs, or is there another way to adjust the revenue allowance to eliminate the costs to be allocated?

With respect to promotional advertising, the Commission also requested comments on what, if any, regulations should be adopted. We are persuaded, based on our review of the comments of the parties, that no further Commission involvement is necessary at this time. We will continue monitoring promotional advertising practices of utilities with a view toward determining whether advertisements run contrary to our goal of energy conservation or otherwise interfere with the utilities' obligation to provide safe and adequate service at the lowest possible rates. If abuses should appear, we will treat them as they occur.*

The Commission Orders:

1. Any party desiring to submit comments on cost allocation methods and related matters with respect to the use of bill inserts by utility management for political purposes is required to send twenty copies in the case of utilities and three copies in the case of other parties to the Commission's Secretary no later than February 2, 1981.

* As a related matter, we have requested comments in Case 27847 on whether we should apply the standard specified in Section 113 of the Public Utility Regulatory Policies Act and assign costs of promotional advertising to the utilities' shareholders.

Appendix B—Order of the Public Service Commission of the State of New York, December 16, 1980.

2. This proceeding is continued.

By the Commission,

SAMUEL R. MADISON
Secretary

(SIGNED)